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IN THE

Supreme Court of the United States

October Term, 1966

No. 489

KINGDOM OF GREECE, MINISTRY OF COMMERCE, PURCHASE DIRECTORATE, *Petitioner*

v.

PETROL SHIPPING CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes and rules involved	3
Statement of the case	5
Reasons for granting the writ	13
A. The promulgation by the Court of Appeals of an ad hoc, retroactive rule for in personam service of process in a District Court action is in direct conflict with the Rules Enabling Act and with the principles of Miner v. Atlass, 363 U.S. 641	14
(1) The conflict with the Rules Enabling Act	15
(2) The conflict with Miner v. Atlass	19
B. The decision below as to the effect of Rule 4's failure to provide for service on a foreign sovereign is in conflict with decisions of other circuit and district courts	23
C. The decision below creates confusion and potential difficulties both in the administration of the Federal Rules and in our relationships with foreign sovereigns	26
Conclusion	28

Appendix A (Court of Appeals opinion and judgment)	1a
Appendix B (District Court opinion)	14a
Appendix C (Earlier opinions in this case)	20a

CITATIONS

CASES: Page

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 ... 21
Barrow S.S. Co. v. Kane, 170 U.S. 100 18
Berlanti Const. Co. v. Republic of Cuba, 190 F. Supp. 126 (S.D.N.Y.) 24, 25
Comisaria General v. Victory Transport Incorporated, No. 815, OT 1964, cert. denied, 381 U.S. 934 22
Employers Reinsurance Corp. v. Bryant, 299 U.S. 374 14
Hanna v. Plumer, 380 U.S. 460 16
Hellenic Lines, Ltd. v. Moore, 345 F. 2d. 978 (App. D. C.) 24, 25, 26, 27
Link v. Wabash Railroad Co., 370 U.S. 626 17
Los Angeles Brush Corp. v. James, 272 U.S. 701 16
Miner v. Atlass, 363 U.S. 641 .....14, 19, 20, 21, 22
Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D.N.Y.), aff'd per curiam, 238 F. 2d 400 (C.A. 2), cert. denied, 353 U.S. 936 .....24, 25, 26, 28
Peru, Ex parte, 318 U.S. 578 14
Petrol Shipping Corp. v. Kingdom of Greece, 326 F. 2d 117, 332 F. 2d 370 (C.A. 2); Appendix C hereto 7, 8, 20a, 21a
Puente v. Spanish National State, 116 F. 2d 43 (C.A. 2), cert. denied, 314 U.S. 627 7
Purdy Co. v. Argentina, 333 F. 2d 95 (C.A. 7), cert. denied, 379 U.S. 962 .....22, 23, 25, 26
Schlagenhauf v. Holder, 379 U.S. 104 16
Story v. Livingston, 13 Peters 359 18
United Corp., In re, 283 F. 2d 593 (C.A. 3) 17
United States v. Adler's Creamery, 107 F. 2d 987 (C.A. 2) 18
Victory Transport, Inc. v. Comisaria General, 336 F. 2d 354 (C.A. 2), cert. denied, 381 U.S. 934 ....10, 11, 14, 28

STATUTES AND RULES:

United States Arbitration Act, 9 U.S.C. § 4 .....3, 14
United States Code, Title 28, § 2071 .....3, 19
United States Code, Title 28, § 2072 (Rules Enabling Act) 3, 15, 16, 19

Federal Rules of Civil Procedure Page

Rule 4(d)(1) 11
Rule 4(d)(3) 3, 10, 11
Rule 4(d)(7) 3, 10, 11, 24
Rule 4(e) 10
Rule 83 .....4, 12, 17, 21, 27

MISCELLANEOUS:

Green, The Admissibility of Evidence Under the Federal Rules, 55 Harv. L. Rev. 197 (1941) 17
Moore's Federal Practice, Vol. 7 (2nd ed., 1955) 17, 18

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The petitioner, the Kingdom of Greece, Ministry of Commerce, Purchase Directorate, respectfully prays that a writ of certiorari issue directed to the opinion and judgment entered on April 21, 1966, by the United States Court of Appeals for the Second Circuit in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 360 F.2d 103 and is reprinted in Appendix A hereto, p. 1a, *infra*.

The opinion and order of the District Court for the Southern District of New York (Feinberg, J.) is reported at 37 F.R.D. 437 and is reprinted at Appednix B hereto, p. 14a, *infra*.

The earlier panel and *en banc* decisions of the Court of Appeals in this case are reported at 326 F. 2d 117 and 332 F. 2d 370 and are reprinted in Appendix C hereto, p. 20a, *infra*. The original, unreported memorandum decision of the District Court appears in Appendix C hereto at p. 25a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1966. See p. 13a, *infra*. A petition for rehearing *en banc* was denied on June 22, 1966. This petition for a writ of certiorari was filed within 90 days following that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Has a federal court of appeals power under any provision of law to promulgate its own *ad hoc* rule of *in personam* service for use in a district court proceeding and to apply it retroactively to validate service by ordinary mail on the agency of a foreign government where

(1) *in personam* service of a petition to compel arbitration in accordance with the Federal Rules of Civil Procedure is made mandatory by the United States Arbitration Act; and

(2) there is no provision in the Federal Rules permitting *in personam* service of such a petition upon an agency of a foreign government?

STATUTES AND RULES INVOLVED

Section 4, United States Arbitration Act, 9 U.S.C. § 4:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure . . . .

Title 28, United States Code, Chapter 131—Rules of Court, 28 U.S.C. §§ 2071, 2072:

§2071. *Rule-making power generally*

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

§2072. *Rules of civil procedure for district courts*

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process,

writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Rule 4(d), Federal Rules of Civil Procedure:

(d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * * * * * * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

* * * * * * * * *

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

* * * * * * * * *

Rule 83, Federal Rules of Civil Procedure:

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not in-

consistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

* * * * * * * * *

STATEMENT OF THE CASE

The petitioner herein is the Kingdom of Greece, appearing specially through the Greek Ambassador to the United States. The Kingdom of Greece seeks review of the judgment below directing it and the Purchase Directorate of its Ministry of Commerce to proceed to arbitration of a dispute under a charter party.

On or about February 12, 1960, representatives of the Purchase Directorate of the Ministry of Commerce, an official agency of the Greek Government, entered into a written voyage-charter with the respondent Petrol Shipping Corporation, the owner of the tanker *Atlantis*. Pet. App. 15-16.[1] The charter provided for the carriage of a cargo of grain purchased by the Greek Government from the United States pursuant to the Agricultural Trade Development and Assistance Act, 7 U.S.C. §§ 1691-1736.

The charter party contained a standard arbitration clause. That clause provided that should any dispute arise between the parties "the matter in dispute shall

[1] "Pet. App." refers to the petitioner's printed appendix (white cover) filed in the Court of Appeals. "Resp. App." refers to the printed appendix (gray cover) attached to the brief of the respondent Petrol Shipping Corporation filed in the Court of Appeals.

be referred to three persons in New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for purposes of enforcing any award, this agreement may be made a rule of the Court." Pet. App. 16.

In January of 1963, the respondent shipowner filed in the federal district court for the Southern District of New York a petition to compel arbitration of a dispute under the foregoing charter party. Pet. App. 15-17. This petition was filed pursuant to § 4 of the United States Arbitration Act, 9 U.S.C. § 4. It asserted that the Greek Government had declined to arbitrate a dispute relative to responsibility for damages allegedly sustained by the *Atlantis* while unloading its cargo at a berth designated by the Greek Government at Piraeus, Greece. The respondent shipowner prayed for an order directing the Greek Government "to proceed to arbitration in accordance with the terms of its written agreement." Pet. App. 17.

Copies of this petition to compel arbitration, annexed to notices of a hearing on a motion for an order directing the Kingdom of Greece to proceed to arbitration, were mailed by one Lillian F. Clark, described only as being "over the age of eighteen years." Pet. App. 19-21. According to her "affidavits of service by mail," she "served" the notices of motion and the annexed petitions on January 10, 1963, by depositing copies thereof, "securely enclosed in a post-paid wrapper," in a regular United States postal box directed to the following:

> (1) The Ministry of Commerce, State Purchase Directorate, c/o Greek Government, For-

eign Trade Administration, 2211 Massachusetts Avenue, N.W., Washington, D. C.

(2) The Kingdom of Greece, Ministry of Commerce, Purchase Directorate, 30 Rockefeller Plaza, New York 20, New York.

(3) Messrs. Becker & Greenwald, described as "the proctors for the Kingdom of Greece, Ministry of Commerce, Purchase Directorate," 839 17th Street, N.W., Washington 6, D. C.[2]

Following this so-called "service" the Greek Ambassador, appearing specially in the District Court, suggested want of jurisdiction to sue the Kingdom of Greece *in personam* without its consent. Pet. App. 22-23. On February 21, 1963, District Judge Dawson dismissed the petition to compel arbitration, stating in a memorandum decision (See pp. 25a-27a, *infra*) that:

> "If the Government of Greece is ready to proceed with the arbitration there is no occasion for this Court to direct them to arbitrate. If it is not ready to proceed to arbitration, but prefers to rely on its sovereign immunity, there is no jurisdiction in this Court to compel it to act. The motion is denied."

On appeal, a panel of the Second Circuit (Swan, Clark and Marshall, JJ.) affirmed the judgment of the District Court. *Petrol Shipping Corporation* v. *Kingdom of Greece,* 326 F.2d 117 (C.A. 2); Appendix C hereto, p. 21a, *infra.* It did so on the authority of *Puente* v. *Spanish National State,* 116 F.2d 43 (C.A. 2), *cert. denied,* 314 U.S. 627. Circuit Judge Clark

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[2] The respondent shipowner has never contended, and the courts below did not hold, that the law firm of Becker & Greenwald was authorized to accept service for the Kingdom of Greece or any agency thereof.

dissented, urging that the case be reversed and remanded for ascertainment of the State Department's position as to the claim of sovereign immunity. 326 F.2d at 118.

On March 12, 1964, the Second Circuit granted the respondent shipowner's petition for rehearing *en banc* without further oral argument; and it requested the United States to file a brief *amicus curiae,* with permission given the parties to file further briefs in light thereof. Pet. App. 31. Following the submission of such briefs, the Second Circuit, sitting *en banc,* entered the following *per curiam* (332 F.2d 370; Appendix C hereto, pp. 20a-21a):

> "Upon consideration of the brief filed by the United States as *amicus curiae* on the rehearing *en banc* at the request of the Court and the additional briefs of the parties, the Court considers further development of the facts to be desirable before disposition of the important issues of law that have been raised. To that end, we alter the decision of the panel, 326 F.2d 117 (2 Cir. 1964), vacate the judgment of the District Court dismissing the petition, and remand the case to the District Court with instructions to take such evidence as is relevant to the contentions of the parties and to make a further determination in the light thereof and the arguments made thereon by the parties and, if the District Court deems desirable, by the United States. The costs of this appeal will abide the ultimate determination."[3]

The case was accordingly remanded to the District Court for further proceedings, which were conducted

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[3] Circuit Judge Swan did not participate in this *per curiam* decision and Circuit Judge Marshall stated: "I dissent and would adhere to the decision of the panel." See p. 21a, *infra.*

by District Judge Feinberg following the death of Judge Dawson. At the hearing before Judge Feinberg on October 29, 1964, counsel for the parties entered into a stipulation regarding the aforementioned manner in which the petition to compel arbitration and the notice of motions had purportedly been served upon the Ministry of Commerce, Becker & Greenwald, and the Kingdom of Greece. Pet. App. 36. It was further agreed that the following documents would be among those entered on the record by the respondent shipowner (Pet. App. 27-28):

(1) A letter from the Greek Ambassador to the Secretary of State, dated September 30, 1964, enclosing a memorandum requesting that the Department of State express to the District Court its recognition of the Greek Government's claim of sovereign immunity in this action. Resp. App. 1a-5a. The memorandum contained the additional request that the Department of State inform the District Court "that personal service of process of a United States Court cannot be made upon the Kingdom of Greece by mailing copies thereof to the diplomatic or other representatives of the Kingdom of Greece." Resp. App. 4a.

(2) The reply from the Secretary of State, addressed to the Charge d'Affaires ad interim of Greece. Resp. App. 6a-11a. Making reference to and attaching a copy of the so-called Tate Letter, this reply stated that application of the policy of the Tate Letter compelled the Department to conclude "that the acts on which the suit is based are private acts *(jure questionis)*" and hence that the Department could not comply with the Ambassador's request for recognition of sovereign immunity from suit in the instant case. Resp. App. 62-7a. The reply concluded by the following reference to the question of personal service and other matters raised by the Ambassador: "It follows that

the other questions raised by the Memorandum attached to the Ambassador's note are matters for the Court." Resp. App. 7a.[4]

In the meantime and prior to the final determination by the District Court, the Second Circuit (Smith, Kaufman and Marshall, JJ.) rendered its decision in *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes,* 336 F. 2d 354, *cert. denied,* 381 U.S. 934. In that case the Second Circuit sustained an order under the United States Arbitration Act directing an agency of the sovereign Government of Spain to arbitrate a charter party dispute. It upheld *in personam* service of the petition to compel arbitration by reference to two provisions of Rule 4 of the Federal Rules of Civil Procedure:[5]

(1) Analogizing foreign sovereign agencies engaging in commercial transactions to ordinary nongovernmental foreign corporations, the court held that service was adequate under the provisions of Rule 4(d) (3) and (7), dealing with service on foreign corporations and associations; and

(2) The court further held that service had been sufficient under Rule 4(e), since there had been a court order authorizing service by registered mail.

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[4] Also introduced into the record by the respondent shipowner were copies of its counsel's letter to the Legal Adviser of the State Department, setting forth its views of the dispute, and the Legal Adviser's reply thereto, stating that the Department had declined to recognize the sovereign immunity claim in this instance. Resp. App. 12a-15a.

[5] Service of the petition to compel arbitration in the *Victory Transport* case took the form of sending the petition and notice by registered mail from the petitioning shipowner to the official Spanish agency, the Comisaria General, at its home office in Madrid, Spain. A court order purportedly authorized this form of service.

In the instant proceeding, District Judge Feinberg felt himself bound in all respects, including the problem of *in personam* service, by the *Victory Transport* decision of the Court of Appeals. See Pet. App. 3-12, and Appendix B hereto, p. 14a, *infra*. He accordingly granted the respondent's motion to compel the Kingdom of Greece to proceed to arbitration.

The Kingdom of Greece duly noted an appeal to the Second Circuit from the order granting that motion. The matter was then heard by a panel composed of Chief Judge Lumbard and Circuit Judges Friendly and Smith. On April 21, 1966, that panel affirmed the District Court's order. Appendix A hereto, p. 1a, *infra*. The opinion was written by Circuit Judge Smith, the author of the opinion in the prior *Victory Transport* case.

Significantly, however, the opinion in this case completely repudiated the *Victory Transport* rationale of service. Whereas the *Victory Transport* opinion had analogized a foreign sovereign engaged in a commercial transaction to an ordinary foreign corporation and had then justified service on the sovereign under Rule 4(d) (3) and (7), the opinion in this case rejected that analogy. It found that the Purchase Directorate is "essentially merely an agency of the Greek government" (p. 7a, *infra)* and as such is not among the parties described in Rule 4(d) (1) or (3), thereby making Rule 4(d) (7) inapplicable as well (p. 6a, *infra)*. The court then concluded that no provision of Rule 4 covers a foreign sovereign or an agency thereof, that "Neither Rule 4(d) (3), nor any other part of Rule 4, provides for service on such a party." See p. 7a, *infra*. The court further found no provision in New York state law or in the local federal court rules of the

Southern District of New York that would permit the kind of service here attempted on an agency of a foreign sovereign.

In the absence of any such provision for service in Federal Civil Rule 4 or in other court rules, the Second Circuit proceeded to fashion its own *ad hoc* rule, giving retroactive approval to the service by ordinary mail that the respondent shipowner had effectuated upon the Purchase Directorate's office in New York City. It did so, at least in part, by reference to Rule 83 of the Federal Rules of Civil Procedure, but stated that if, "for some reason, that part of Rule 83 authorizing *ad hoc* rules could not be used, then the court may fashion a rule outside the Federal Rules altogether, although this really amounts to the same thing as the *ad hoc* provisions of Rule 83." See p. 8a, *infra*.

The acknowledged omission of any provision in Rule 4 for service on a foreign sovereign agency was held not "to manifest a policy that no *in personam* actions against foreign sovereigns could ever be brought" but rather to reflect the fact "that legislators and rule-makers have failed to catch up on their procedural provisions with the more substantive developments in this field of law [restricting immunity of foreign governments to public or sovereign acts]." See pp. 10a-11a, *infra*. Hence the court concluded that there was a need for judicial formulation of a rule permitting such *in personam* service.

A petition for rehearing *en banc*, directed solely to the question of the power of the Court of Appeals to promulgate such an *ad hoc* retroactive rule of service, was summarily denied.

REASONS FOR GRANTING THE WRIT

The decision below is unprecedented in several respects. For the first time, a federal court of appeals has asserted and then exercised the power, heretofore thought to reside exclusively in this Court, to promulgate a rule for *in personam* service of process for use in a federal district court action. For the first time, a federal court of appeals has sought, upon an *ad hoc* and retroactive basis, to permit *in personam* service upon a foreign sovereign. And it has done all this on the premise that there is a need, which it can meet, to remedy a *casus omissus* in the Federal Rules of Civil Procedure.

The significant questions created by this unique decision are manifold. They directly concern the administration of the federal court system in general and the Federal Rules of Civil Procedure in particular. They also concern and possibly may affect the foreign relations of the United States; permitting *in personam* service upon the representatives of a foreign sovereign is fraught with international repercussions and potential impairment of diplomatic functions. Left unexamined and unanswered by this Court, these questions may plague and confound both the federal court system and our relationships with foreign sovereigns. Since the ruling below reflects not only confusion within the Second Circuit itself but inconsistency with the pertinent statutes and rules, the relevant principles established by this Court, and the decisions in point reached by other federal courts and judges, the grant of certiorari becomes most appropriate and compelling.

A. THE PROMULGATION BY THE COURT OF APPEALS OF AN AD HOC, RETROACTIVE RULE FOR IN PERSONAM SERVICE OF PROCESS IN A DISTRICT COURT ACTION IS IN DIRECT CONFLICT WITH THE RULES ENABLING ACT AND WITH THE PRINCIPLES OF MINER v. ATLASS, 363 U.S. 641.

The court below properly acknowledged the necessity of *in personam* service of a petition to compel arbitration pursuant to the United States Arbitration Act. Not only is such service essential to the exercise of a federal court's jurisdiction to adjudicate a suit *in personam*, see *Employers Reinsurance Corp.* v. *Bryant*, 299 U.S. 374, 382; *Ex parte Peru*, 318 U.S. 578, 587, but Section 4 of the Arbitration Act expressly requires that service of a petition thereunder "shall be made in the manner provided by the Federal Rules of Civil Procedure." Thus the service provisions of Rule 4 of those Federal Rules are controlling in this instance.[6]

The court below further acknowledged, contrary to its prior view in the *Victory Transport* case, 336 F.2d at 364, that there is no provision in Rule 4 which deals with or permits service *in personam* upon an agency of a foreign sovereign, whatever the nature of the cause of action. It expressly abandoned its *Victory Transport* rationale that a commercial branch of a foreign sovereign is sufficiently akin to an ordinary nongovernmental foreign corporation to permit service on the agency of the sovereign pursuant to Rules 4(d) (3) and 4(d) (7). The view of the court now is

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[6] Since the Arbitration Act requires compliance with the service provisions of Rule 4, it can be said that the Arbitration Act encompasses Rule 4 as written and promulgated by this Court pursuant to the Rules Enabling Act, 28 U.S.C. §2072. There is no basis for assuming that the Arbitration Act also means to include service of a petition pursuant to some other rule—not a part of Rule 4 as written—promulgated by a federal court of appeals.

that such an analogy is improper and that such a branch must be viewed as an agency of the sovereign. And the court has now found no provision in the local court rules or in the New York state practice, as incorporated in Rule 4(d) (7), which permits service in the manner here attempted. In short, the petitioner herein was found to be "essentially merely an agency of the Greek government" and "Neither Rule 4(d) (3), nor any other part of Rule 4, provides for service on such a party." Appendix A hereto, p. 7a, *infra.*

Faced with what it called "a *casus omissus* both in the Federal Rules and in New York law," p. 10a, *infra,* the court below proceeded to the self-appointed task of fashioning and promulgating a new *ad hoc* rule of *in personam* service.[7] It did so by giving retroactive sanction to one of respondent's three mailings—*i.e.,* the posting, by ordinary mail, of a copy of the petition to compel arbitration directed to the Greek Purchase Directorate's office in New York City. In the court's words, p. 11a, *infra.* "We hold only that service on the branch which is a party to the contract sued on is sufficient." In so holding, the court below has created the following conflicts and problems:

(1) The Conflict with the Rules Enabling Act

The provisions of the Rules Enabling Act, 28 U.S.C. § 2072, directly belie the assertion by a federal court of appeals of power to fashion a new rule of *in personam*

[7] None of the parties urged the Court of Appeals to consider or adopt a new rule of service; nor was any opportunity afforded the parties to comment upon or to present their views as to the propriety or legality of the new rule that was adopted. The District Court, of course, had made no effort to formulate or promulgate a new rule, merely relying upon the now-abandoned service rationale of the *Victory Transport* decision.

service for use in federal district court actions—even when that assertion is limited to the promulgation of rules "not inconsistent with the Federal Rules" and "consistent with common law principles." See pp. 8a-9a, *infra*. That Act plainly states that "The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions." No other federal courts, and certainly not the courts of appeals, are delegated this rule-making power respecting civil actions brought in federal district courts.

That the prescribing of rules of service in district court civil actions comes within the Rules Enabling Act and hence within this Court's exclusive authority is plain from the decision in *Hanna* v. *Plumer*, 380 U.S. 460, 464. The Court there held that "[p]rescribing the manner in which a defendant is to be notified that a suit has been instituted against him . . . relates to the 'practice and procedure of the district courts' " within the meaning of that Act; and the service provisions of Rule 4(d) (1), which had been duly promulgated by this Court, were held authorized by the Act. It would follow that this Court, and only this Court, can authorize a new rule of *in personam* service to supplement Rule 4 or to cure an omission therein. Such a determination of who may be served, and in what manner, concerns rules "which by law it is the duty of this Court to formulate and put in force." *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, 706. Only this Court can "formulate the necessary guidelines in this area." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112.

The invasion by the Court of Appeals of this Court's rule-making prerogative is in no way blunted by the

references in the opinion below to Rule 83 or to common law principles. Rule 83 deals only with certain residual rule-making powers of federal district courts for use in their proceedings; it does not purport to authorize or recognize any such power in the courts of appeals.[8] At most, Rule 83 concerns itself with the power of district courts—acting either through the adoption by a majority of the judges of formal rules reported to this Court or through the entry of procedural orders in individual cases—to fill in certain procedural details and minutiae within the framework of the Federal Rules.[9] See *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633, fn. 8 (district court order dismissing complaint for failure to prosecute); *In re United Corp.*, 283 F. 2d 593 (C.A. 3), cited by the court below, p. 8a, *infra* (district court order fixing time limit for filing objections). Since the District Court in this proceeding did not seek to invoke its power under Rule 83 and since that Rule gives no

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[8] Rule 83 provides: "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

The original Advisory Committee which drafted Rule 83 eliminated from its final report to this Court an alternative provision which would have required the concurrence of a majority of the respective circuit judges in any rule adopted by a district court under Rule 83. Moore's Federal Practice, Vol. 7, ¶83.02, p. 4702 (2nd ed., 1955).

[9] "It is not thought . . . that Rule 83 was intended to cover anything other than procedural details and matters overlooked in preparing the rules." Green, *The Admissibility of Evidence Under the Federal Rules*, 55 Harv. L. Rev. 197, 206 (1941).

independent authority to the Court of Appeals to act on behalf of the District Court or to promulgate its own rule, Rule 83 can give no cloak of legal propriety to the rule of service announced below.

Nor do the common law principles and authorities cited by the court below, pp. 8a-9a, *infra,* provide support for the rule-making power asserted in this case. Such decisions as *Story* v. *Livingston,* 13 Peters 359, and *Barrow S.S. Co.* v. *Kane,* 170 U.S. 100, long antedate the adoption of the Federal Rules of Civil Procedure. And their references to common law rules of jurisprudence and the practice of the high court of chancery in England have no relevance whatever in determining whether a particular federal court has any rule-making function under the Rules Enabling Act with respect to the modern-day Federal Rules.

This Court's exclusive power to formulate and promulgate rules of practice for use in district court actions has never before been challenged or even questioned. From the very birth of the Federal Rules of Civil Procedure it has been said that "The power of the Supreme Court to amend the new rules seems conceded by all." *United States* v. *Adler's Creamery,* 107 F.2d 987, 992, fn. 2 (C.A. 2, Clark, J.); and see Moore's Federal Practice, Vol. 7, ¶86.04 (2nd ed., 1955). Now the court below has asserted its own independent authority to formulate and sanction new *ad hoc* rules of service in situations where the Federal Rules are silent. If that assertion is left unchecked, a precedent will have been established for federal courts of appeals to attempt to cure whatever they feel may be defects or omissions in any of the Federal Rules. The power asserted below is not only a power to amend the service provisions of Rule 4 but also a power to amend the pro-

visions of any other Federal Rule. If sustained, such power could soon destroy the symmetry and uniformity of the Federal Rules. What might be considered proper service on a foreign sovereign in the Second Circuit might be (as it is) improper in the Seventh Circuit; conflicting rules would soon appear in this and in other areas of district court practice and procedure.

The grant of certiorari thus becomes imperative in order to give effect to the Rules Enabling Act and its grant of exclusive authority to this Court to prescribe, amend or supplement the basic rules of practice and procedure of the district courts. The statutory guidelines as to the rule-making powers of the federal courts are in urgent need of clarification and restatement if the Federal Rules of Civil Procedure are to be maintained on a uniform and cohesive basis.[10]

(2) The Conflict with Miner v. Atlass

The promulgation by the court below of a rule of service not provided by Rule 4 of the Federal Rules is directly contrary to the rule-making principles established by this Court in *Miner* v. *Atlass*, 363 U.S. 641. That conflict serves to heighten the appropriateness of the grant of certiorari in this case.

This Court held in *Miner* that a local rule of a federal district court, purporting to authorize the taking of depositions in admiralty actions, was invalid in light of the failure of this Court's General Admiralty Rules specifically to authorize such depositions. Expressly re-

[10] No question is raised in this case as to the power of a federal court of appeals to prescribe rules for the conduct of its own business. Congress has expressly given the courts of appeals that power. 28 U.S.C. §2071, entitled "Rule-making power generally." The rule promulgated in this instance, of course, was not in exercise of that power.

jected was the claim that a court of admiralty has inherent power, not dependent on any statute or rule, to order the taking of such depositions; and the local court rule which sought to authorize the depositions was held not to be a valid exercise of that court's power to regulate local practice. This Court viewed the problem of deposition taking in admiralty cases as a weighty and complex one in a field of federal jurisdiction "where nationwide uniformity has traditionally been highly esteemed." 363 U.S. at 650. In that setting, the Court said:

> "The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of this Court, see 28 U.S.C. § 331 (advisory function of Judicial Conference), 28 U.S.C. § 2073 (prior report of proposed rule to Congress), designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress as would now be required under 28 U.S.C. § 2073." 363 U.S. at 650.

In this case, as in *Miner* v. *Atlass,* the making of a rule respecting *in personam* service upon a foreign sovereign or an agency thereof is one of those "basic procedural innovations" that are peculiarly within the exclusive competence of this Court. It may well be that the framers of Rule 4, including this Court, thought it

unwise to make provision for service upon a foreign sovereign, particularly in view of the international implications. But whatever the reason for the omission, the problem is so complex and international in scope and so demanding of uniformity of answer as to permit a rule of service to be formulated only after "exacting observance of the statutory procedures surrounding the rule-making powers of the Court" and only after "mature consideration of informed opinion from all relevant quarters." See also *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 424 (referring to this Court as the "federal authority" for resolving judicial problems "uniquely federal in nature").

Miner v. *Atlass* has further relevance here in its hesitancy to construe General Rule 44 (permitting district courts to make rules of practice not inconsistent with the General Rules) "as permitting a change so basic as this to be effectuated through the local rule-making power, especially when that course was never reported to Congress . . ." By the same token, one should hesitate to construe Rule 83 of the Federal Rules (permitting district courts to make rules of practice not inconsistent with the Federal Rules) as permitting so basic an innovation as *in personam* service on foreign sovereigns and their agencies. And that hesitancy should extend as well to any other supposed source of power, be it the common law or inherent authority, for promulgating the rule announced below. When a problem, such as service on foreign sovereigns, has great complexity and manifold implications, when the need for uniformity of treatment of the problem is manifest, *Miner* v. *Atlass* teaches that lower court rule-making powers are not to be construed as encompassing such a problem.

Moreover, any real or imagined need for the rule of service here in question cannot suffice as the source of a lower court's promulgating authority or as the basis for rejecting the mandate of the Rules Enabling Act or the principles of *Miner* v. *Atlass*. The court below expressed the thought that there is now greater occasion to sue foreign sovereigns and effectuate service upon them than when the Federal Rules were originally adopted and that the rule-makers have simply neglected to keep procedural pace with the substantive developments which purportedly permit such suits.[11]

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[11] The court below said (p. 11a, *infra*) that the recent trend toward restricting the sovereign immunity concept to public or sovereign acts, thereby permitting suits against sovereigns on commercial causes of action, has augmented the occasion for making service on such sovereigns. In the court's view (pp. 10a-11a, *infra*), the failure of Rule 4 to make provision for such service "cannot reasonably be considered to manifest a policy that no *in personam* actions against foreign sovereigns could ever be brought" but rather reflects the fact that "legislators and rule-makers have failed to catch up in their procedural provisions with the more substantive developments in this field of law."

But it is questionable if any court other than the Second Circuit has accepted the restrictive theory of sovereign immunity or has permitted *in personam* suits against foreign sovereigns without their consent on commercial causes of action. The Second Circuit has endorsed the restrictive theory in this and in the *Victory Transport* case—which the Solicitor General has described as "the first clear-cut departure by an American federal court from the so-called absolute theory of sovereign immunity upheld in *Berizzi Bros. Co.* v. *S. S. Pesaro*, 271 U.S. 562 . . . [and] apparently the only federal case to uphold an *in personam* action against an objecting foreign sovereign or its unincorporated agency or department." Memorandum for the United States as Amicus Curiae, p. 7, *Comisaria General* v. *Victory Transport Incorporated*, No. 815, Oct. Term 1964, *cert. denied*, 381 U.S. 934.

Thus the so-called need for the rule of service in question springs only from the suits to compel arbitration brought in this case and in the *Victory Transport* case. No other court has indicated or suggested such a need. Cf. *Purdy Co.* v. *Argentina*, 333 F.2d 95 (C.A. 7), *cert. denied*, 379 U.S. 962.

But neither Congress nor this Court has recognized that a court of appeals can respond to such a need, if there be one, by promulgation of a rule of service. That is precisely the kind of problem entrusted to this Court by the Rules Enabling Act.

And even if there be a need for promulgating such a rule of service, the problems and the implications of the rule are not confined to litigation arising in the Southern District of New York or in the Second Circuit. The national and international implications are such as to demand mature consideration of informed opinion from all relevant quarters; if a rule of service on foreign sovereigns then be deemed appropriate, the rule would need nationwide promulgation to assure uniformity of treatment of foreign sovereigns in federal courts. The problem does not lend itself to case-by-case or Circuit-by-Circuit development.

There thus exists a pressing occasion to clarify the areas of rule-making authority which are within the exclusive ambit of this Court, making plain the boundaries over which courts of appeals may not step. Only by such a clarification can the proper administration of the rules of practice and procedure in federal district courts be kept exclusively in the hands of this Court.

B. THE DECISION BELOW AS TO THE EFFECT OF RULE 4's FAILURE TO PROVIDE FOR SERVICE ON A FOREIGN SOVEREIGN IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT AND DISTRICT COURTS.

The concession by the court below that no provision of Rule 4 authorizes personal service upon a foreign sovereign agency, even when sued on a commercial cause of action, is confirmed by the decisions of other federal courts. The Seventh Circuit, in *Purdy Co.* v. *Argentina,* 333 F. 2d 95, 97, *cert. denied,* 379 U.S. 962,

held that "Rule 4 of the Federal Rules makes no provision for service upon a foreign government"—even where, as in *Purdy,* the foreign government is sued on a commercial sales transaction. See also *Oster* v. *Dominion of Canada,* 144 F. Supp. 746 (N.D.N.Y.), *aff'd per curiam,* 238 F.2d 400 (C.A.2), *cert. denied,* 353 U.S. 936; *Berlanti Const. Co.* v. *Republic of Cuba,* 190 F. Supp. 126 (S.D.N.Y.).[12]

That conclusion has also been acknowledged by the United States Government, speaking through a Department of Justice brief filed in the Court of Appeals for the District of Columbia Circuit in *Hellenic Lines, Ltd.* v. *Moore,* 345 F. 2d 978.[13] In its Supplemental Brief in that case, the Government stated (pp. 5-6):

> "The Federal Rules of Civil Procedure, as they presently stand, make no provision for the service

[12] The *Oster* case held that there is no precedent under the Federal Rules for personal service on a foreign sovereign's agent and that no other authority exists for such service. The *Berlanti* case held that personal service in Havana upon the Minister of the Presidency of Cuba is invalid under Rule 4(d)(7).

[13] The court in *Hellenic Lines* refused to mandamus a federal marshal to serve a personal summons upon the ambassador of a foreign sovereignty that had been sued in the District of Columbia upon a contract executed by a commercial branch thereof. In his concurring opinion, 345 F. 2d at 983, fn. 7, Circuit Judge Washington wrote:

> "It is to be observed that a sovereign state has rarely been named as defendant or respondent, in suits brought in courts of this country for a money judgment against that state, as distinguished from suits based upon a seizure of property in this country claimed by the state, or counterclaims interposed after the foreign state has invoked a court's jurisdiction. So far as I am advised jurisdiction in such a suit has never been successfully obtained."

Among the cases cited in support of that statement were the Seventh Circuit's *Purdy* decision, as well as the *Oster* case.

of process on foreign sovereign entities. In our research of the original and subsequent commentaries of the Advisory Committee on Civil Rules we have found no reference to adjective law issues raised when attempts are made to sue foreign states in municipal courts. No discussion by commentators has been found. The conclusion that the draftsmen of the Rules and the members of the Advisory Committee did not contemplate suits against foreign governments is inescapable.

"The dilemma which the appellant, and others similarly situated, faces cannot be remedied by a strained reading of the existing Rules, or the judicial imposition of novel tasks upon the Department of State which—quite aside from the doctrine of separation of powers—that Department is ill-equipped to carry out. The legal vacuum in this area will have to be filled, if at all, by specific legislation."

There is thus uniformity of opinion respecting the absence of any provision in Rule 4 for *in personam* service on a foreign sovereign or its agency. Where the Second Circuit is in conflict with the foregoing Circuit and District Court decisions, however, is in its formulation of its own *ad hoc* rule of service to remedy the conceded omission. Neither the Seventh Circuit in *Purdy* nor the District of Columbia Circuit in *Hellenic Lines,* once it became clear that there is no provision in the Federal Rules for permitting *in personam* service on a foreign sovereign, considered it appropriate to fashion an *ad hoc* rule of service to fit the situation at hand. Those courts, like the courts in *Oster* and *Berlanti,* felt themselves bound to respect Rule 4 as it is written, given effect to its omission with respect to foreign sovereigns.

The court below expressly stated (p. 11a, *infra*) that it was "not disposed to follow" the *Purdy* or the *Oster* rulings "to the extent they hold that a sovereign cannot be served in federal court."[14] There is thus an unresolved conflict, justifying the exercise of this Court's review powers, as to whether federal courts must take Rule 4 as it is written or whether they are free to write in an additional provision with respect to service of process.

C. THE DECISION BELOW CREATES CONFUSION AND POTENTIAL DIFFICULTIES BOTH IN THE ADMINISTRATION OF THE FEDERAL RULES AND IN OUR RELATIONSHIPS WITH FOREIGN SOVEREIGNS.

Apart from the important questions as to the power of the court below to promulgate the service rule in question, the decision below raises significant questions concerning the administration of the Federal Rules generally and concerning American relationships with foreign sovereigns. These questions are deserving of fullest consideration by this Court.

(1) The absence of any power in a panel of a Court of Appeals to promulgate a new rule of service in supplementation of Rule 4 is obvious; only this Court can perform such a function. But even assuming that an appellate panel had such power, should such a rule be promulgated on an *ad hoc* and retroactive basis? Are not the Federal Rules generally, and Rule 4 in particular, meant to be of a uniform and general nature, rather than created and applied on an *ad hoc* basis? Is serv-

[14] The court below, citing the District of Columbia Circuit's ruling in *Hellenic Lines*, stated that it did not mean "to say that service on the sovereign might be effected on any representative of the sovereign." See p. 11a, *infra*. But the *Hellenic Lines* opinion did not intimate, let alone formulate a rule, that service on a representative of a foreign sovereign could be effectuated in any manner under the Federal Rules.

ice of process really a detail or minutiae of local court practice within the scope of Rule 83? And has the court below, while finding "no compelling reason why the court must fashion the rule in advance," given any "compelling reason" for not following its own dictum that "the better practice in a case such as this might be to secure an advance ruling, approving a given method of service"? See p. 8a, *infra*. These are questions that must be answered by this Court before any possible sanctioning of the result reached below.

(2) Will the rule promulgated below, authorizing *in personam* service on a foreign sovereign agency, complicate or embarrass the conduct of our foreign relationships or invite retaliation from foreign courts with respect to agencies of the United States operating abroad? The court below gave no heed to that significant question; it made no effort to secure the advice of the Department of State or other governmental agencies as to the advisability of adopting the rule in question.[15] *Cf. Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (App. D. C.), rejecting a requested form of personal service on a foreign ambassador after receiving advice from the Department of State that such

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[15] At an earlier stage of this litigation, the Department of State, in reliance on the Tate Letter, declined to advise the District Court that the Kingdom of Greece was entitled to assert a sovereign immunity defense. But, in response to the Greek Ambassador's request that the Department comment on the personal service attempted in this case, the Department replied that such a matter was for the District Court to resolve. Resp. App. 7a. Moreover, the so-called Tate Letter, the 1952 letter from the Acting Legal Adviser of the State Department, respecting non-recognition of sovereign immunity claims where commercial transactions are involved, was not meant "to change the requirements of the Federal Rules of Civil Procedure regarding service." Brief of Department of Justice (p. 20), in *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978 (App. D.C.).

service "would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions."

The very fact that Rule 4 makes no provision for service on a foreign sovereign may well represent the considered view of its framers that the foreign policy implications of such type of service are too dangerous to permit such service to be codified or permitted. If any other conclusion or determination is to be made, it should be arrived at only after consideration of the views of those governmental officials best equipped to evaluate the problems. The failure of the court below to seek such advice makes uncertain whether its conclusion is consistent with the best interests of our Government or of our federal court system.

CONCLUSION

Seldom does a decision present so many serious questions concerning the federal court system and its relationships with foreign sovereign defendants. They are questions which have evoked sharply conflicting views among various panels of the Second Circuit: (1) the *Oster* recognition that there is no provision in the Federal Rules for serving a foreign sovereign; (2) the *Victory Transport* theory that a foreign sovereign engaged in a commercial transaction could be personally served by analogy to an ordinary foreign corporation; and (3) the instant decision, repudiating the *Victory Transport* theory and enunciating the court's own power to provide an *ad hoc* rule of service. And they are questions which other Circuits have avoided by simply giving effect to the silence of Rule 4 as to foreign sovereigns.

But the overriding problem created by the decision below is the direct challenge to this Court's exclusive authority to promulgate changes in the Federal Rules of Civil Procedure. That challenge, in addition to the other reasons detailed here, fully justifies the grant of certiorari.

Respectfully submitted,

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